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Nos. 95-259 & 95-779

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DARLENE WALTERS, AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONERS,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER,
RESPONDENTS.

On Writ of Certiorari
to the United States Court of Appeals
For The Seventh Circuit

BRIEF FOR PETITIONER DARLENE WALTERS

CONSTANTINE JOHN GEKAS
Counsel of Record
ADRIANNE S. HARVITT
ALENNA K. BOLIN
HARVITT & GEKAS, LTD.
SUITE 2600
135 SOUTH LA SALLE STREET
CHICAGO, ILLINOIS 60603
(312) 726-4501

QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1988 & Supp. V 1993), applies only to an "employer," in part defined in Section 701(b), 42 U.S.C. § 2000e(b) (1988), to be "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."

The question presented is:

Whether that jurisdictional definition is satisfied when an employer maintains fifteen or more employees on the payroll for the requisite number of weeks even though fewer than fifteen employees report to work or are on paid leave on each day of each such week, as to which the courts of appeals are in direct conflict.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 60 F.3d 1225, and is reproduced in the Appendix to Ms. Walters' Petition for Certiorari (No. 95-259) at 1a-12a.

The decision and order of the district court are reported at 864 F. Supp. 71, and are reproduced in the same Appendix at 13a-19a.

JURISDICTION

The judgment of the Seventh Circuit was entered on July 18, 1995. Petitioner Darlene Walters filed a timely petition for a writ of certiorari on August 14, 1995 as Case No. 95-259.

On October 10, 1995, Justice Stevens granted the Solicitor General's application for an extension of time to file a petition for a writ of certiorari on behalf of the EEOC to and including November 15, 1995. On November 15, 1995, the Solicitor General filed that petition for a writ of certiorari on behalf of petitioner EEOC as Case No. 95-779.

On March 18, 1996, this Court granted both petitions and consolidated the two cases.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

This case involves the definition of "employer" in Section 701(b) of Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, Title VII, § 701(b), 78 Stat. 241, 253 (1964), as amended by Pub. L. No. 92-261, § 2(2), 86 Stat. 103, 104-05 (1972), 42 U.S.C. § 2000e(b) (1988) as amended, which provides, in pertinent part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . . (Pet. App. 20a).[1]

Other pertinent provisions of Title VII; the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1988 & Supp. V 1993); and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* (Supp. V 1993), are reprinted at Pet. App. 20a-29a.

STATEMENT OF THE CASE

Introduction

Respondent Metropolitan Educational Enterprises, Inc. (Metropolitan) sells and finances encyclopedias, dictionaries and other items to retail customers throughout the United States. (Supp. Stips. ¶ 1, JA 17). Respondent Leonard Bieber is the company's sole shareholder, president and chief operating officer. (Answers to Walters' Cmplt. ¶ 3, R. 20 & 21; Stips. ¶ 9, JA 23).[2]

Operating from offices in Chicago, Illinois, Metropolitan

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[1] The Appendix to Ms. Walters' Petition for Writ of Certiorari, filed in Case No. 95-259, is cited as "Pet. App. ___." Her Supplemental Appendix attached to her Supplemental Brief in support of her Petition is cited as "Supp. Pet. App. __." The Joint Appendix filed with this Brief is cited as "JA __." The original record is cited as "R. __."

[2] Both respondents will be referred to as "Metropolitan" unless the context requires separate reference.

transacts business nationwide through a sales force of independent "dealer's representatives" who tender sales contracts obtained from retail customers to Metropolitan. (Supp. Stips. ¶ 4, JA 17-18; Bieber Dep., JA 15-16).

From early 1986 until April 1990, petitioner Darlene Walters was employed by Metropolitan as a collector. (Answers to Walters' Cmplt. ¶ 8, R. 20 & 21).

In September 1989 she was denied a promotion to the position of credit manager. (Stips. ¶ 3, JA 21). Ms. Walters filed a charge of gender discrimination with the EEOC alleging that Metropolitan and Mr. Bieber had illegally denied her the promotion because of her gender and had hired a less qualified male to fill that position. (Answers to Walters' Cmplt. ¶ 6, R. 20 & 21).

On April 23, 1990, Metropolitan and Mr. Bieber discharged Ms. Walters. She thereupon filed another EEOC charge against Metropolitan for illegal retaliation. (Answers to Walters' Cmplt. ¶¶ 14-15, R. 20 & 21).

The District Court Action

Three years later, in April 1993, the EEOC filed suit against Metropolitan and Mr. Bieber alleging that the April 23, 1990 discharge had been illegal retaliation in violation of Section 704(a) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-3(a) (1988). (EEOC Cmplt., R. 1).

Ms. Walters then intervened as a matter of right under 42 U.S.C. § 2000e-5(f)(1) (1988), asserting both gender discrimination because she had been denied a promotion and retaliation because she had been fired for filing an EEOC

charge. (R. 9-12).[3] She also asserted two claims under Illinois law -- one for retaliatory discharge and a second for breach of contract. (Walters' Cmplt., R. 12).

Separately answering both the EEOC's and Ms. Walters' complaints, Metropolitan and Mr. Bieber admitted that Ms. Walters had been discharged, but denied the Title VII discrimination and retaliation charges and Ms. Walters' state law claims. (Answers, R. 2, 3, 20 & 21). Metropolitan and Mr. Bieber admitted that Metropolitan was engaged in an industry affecting commerce but denied the complaints' jurisdictional allegations, especially that Metropolitan was an "employer" within the meaning of 42 U.S.C. §2000e(b). (*Id.*).

Metropolitan's Motion to Dismiss

Metropolitan moved to dismiss for lack of subject matter jurisdiction (R. 25), claiming under the rule of *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983), that it was not an "employer" under Title VII because in both 1989 and 1990 there were substantially less than twenty weeks in which fifteen or more employees had been present at work or on paid leave on each working day. (Dfs' Mem. in Supp. of Mot. to Dism., R. 26). In *Zimmerman*, which involved a nearly identical jurisdictional provision of the Age Discrimination in

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[3] The EEOC had found no cause on Ms. Walters' original discrimination charge and issued a notice to that effect, also notifying her of her right to institute her own court action. (Walters' Cmplt. ¶ 7, R. 12). Pursuant to that notice, Ms. Walters had previously filed her own Title VII action in the same district court just before her "right to sue" period expired. She dismissed that action upon being granted leave to intervene in the EEOC's case. (Intervention Motion, R. 9; Order Granting Leave to Intervene, R. 10).

Employment Act of 1967 (ADEA), 29 U.S.C. § 630(b) (1982), the Seventh Circuit had held that hourly employees are to be counted toward the ADEA's jurisdictional minimum number of employees only on days they were either physically present at work or on paid leave. The test of *Zimmerman* has come to be known as the "day-by-day" counting method.

Attached to Metropolitan's Motion to Dismiss were two affidavits. One, by Mr. Bieber, explained his company's payroll system and documents. (JA 8-11). The second purported to tabulate the actual working and paid days off of all of Metropolitan's employees during 1989 and 1990. (Falahee Affidavit, R. 26, Ex. 5).

Based on that evidence, Metropolitan and Mr. Bieber asserted that there were no weeks in 1989 and only three weeks in 1990 in which Metropolitan had fifteen or more employees present at work or on paid leave on each working day, far short of the twenty week minimum.

Discovery

Discovery then focused on the complicated jurisdictional factual questions about the number of employees working for Metropolitan during 1989 and 1990, their employment status (salaried vs. hourly and full-time vs. part-time), their working schedules, including days actually worked, and their paid days off including holidays, vacations, sick days and personal days.

Metropolitan's Payroll Records

As part of discovery, Metropolitan produced a series of its payroll records like those described in Mr. Bieber's Affidavit. Two examples of those records are included in the Joint

Appendix. (JA 13A & 14A).[4]

Mr. Bieber's Affidavit explained that every bi-weekly pay period, Metropolitan prepared a "payroll worksheet" showing his salary information and the daily wage information for the hourly employees. That worksheet was forwarded to Metropolitan's automated payroll service, which in turn prepared and sent back a computer generated "payroll register" reflecting bi-weekly payroll information for all Metropolitan's employees on the payroll. (Bieber Affidavit, JA 8-11; Payroll Register and Worksheet, JA 13A & 14A).

Payroll period -- The original payroll register and Mr. Bieber's affidavit also showed that Metropolitan's bi-weekly payroll period ended on Thursday and started on Friday, and thus did not coincide with the beginning and end of a Monday to Friday calendar workweek. Friday was payday for that bi-weekly pay period. (Payroll Register, JA 13A: shows payroll "period ending 3/08/90," a Thursday, & "Date of Check 3/09/90," a Friday).

Thus, these simple records -- which were disclosed early in the case -- enabled the parties to readily ascertain the number of employees on Metropolitan's weekly payroll. However, as useful as the payroll records were, they did not reveal the central information required by the *Zimmerman* day-by-day method -- the daily work and leave history of Metropolitan's employees. Consequently, the parties were forced to examine

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[4] As with all the payroll records first produced by Metropolitan, portions of those two examples, showing salary and other personal information, are blanked out. Eventually the district court ordered Metropolitan to produce unredacted copies of the payroll records, (3/4/94 Minute Order Granting in Part Motion to Compel, *etc.*, R. 32), but those unredacted copies are not included in the record.

even more basic payroll and time-keeping records.

The Stipulations

For the next ten months, the parties made a detailed examination of two years of Metropolitan's payroll registers, time cards, work diaries, and other timekeeping records. (Stips., JA 20-79; EEOC's Mem. of Law, R. 38, p. 14). Mr. Bieber and his part-time bookkeeper, Bernice Cunningham, were deposed. (EEOC's Mem. of Law, R. 38, p. 14). The district court granted the parties permission to investigate the merits if convenient during the discovery on jurisdiction, but they did not do so. (Walters' Mot. to Compel Discovery, *etc.*, R. 32, p. 2 n.2). Due to the complexity of the jurisdictional inquiry, the parties repeatedly requested and were granted extensions of time for completion of discovery and briefing on the jurisdictional issue. (R. 27-36).

The time and leave records examined by the parties were painstakingly reduced to weekly spreadsheet summaries showing in meticulous detail the precise working history of each employee for each day of each calendar week of 1990. The information from those summaries was then reduced to a narrative stipulation which can be found in the Joint Appendix followed by the spreadsheet summaries in their original form. (Stips. JA 20-27; Spreadsheets, JA 28-79).

The crucial stipulations pertaining to jurisdiction are simple:

> During 1990, Metropolitan had fifteen or more employees on its payroll on each working day of forty-seven calendar weeks, but
>
> During 1990, Metropolitan had fifteen or more employees physically present at work or on paid leave

on each working day of only nine weeks.[5]

(Stips. ¶¶ 11 & 12, JA 23-25).

The parties also stipulated to important subsidiary facts relevant to jurisdiction: that Mr. Bieber was Metropolitan's only salaried employee, that during 1990 Metropolitan had two regular part-time employees, and that all the workers listed on the spreadsheets, including Mr. Bieber and the two part-time workers, were "employees" within the meaning of Title VII. (Stips. ¶¶ 9-10, JA 23).

The parties stipulated that Metropolitan's regular working week and hours were Monday to Friday from 9:00 a.m. to 5:00 p.m., that Metropolitan was not open on weekends and that employees were not expected to work on Saturday, Sunday or eleven specified holidays during the year. (Stips. ¶¶ 6-7, JA 22). Thus, they stipulated that Metropolitan's "working days" were all weekdays (Monday to Friday) excluding those holidays. (*Id.* n.1, JA 22).

The parties stipulated that Metropolitan did not have fifteen or more employees in 1989, the year preceding Ms. Walters' termination. (Stips. ¶ 13, JA 26). The parties made no stipulations about 1988.

Finally, Supplemental Stipulations between Ms. Walters and respondents established that Metropolitan was not a small "mom and pop" operation but was indeed a company engaged in an industry affecting commerce with at least twenty

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[5] These facts were different than those originally advanced by Metropolitan that there were only three weeks in 1990 in which the required fifteen or more employees were at work or on paid leave on each working day. (Dfs Mem. in Supp. of Mot. to Dism., R. 26 p. 3).

independent sales representatives (stipulated by the parties not to be Title VII employees) who sold Metropolitan's product lines by door to door solicitation throughout the country and who arranged for installment financing of those sales. (Supp. Stips., JA 17-19).

The Spreadsheets

The fifty-two spreadsheet summaries -- one for each calendar workweek of 1990 -- reveal not only the details of the 1990 work history of Metropolitan's employees, but also the cumbersome process of parsing those details to solve the jurisdictional puzzle. (Spreadsheets, JA 28-79).

The spreadsheet summaries depict every relevant fact about the employment status of all of Metropolitan's employees for each day of 1990 -- including weekends and holidays -- for each calendar week. They show the identity of the employees, whether their compensation was on a salaried or hourly basis and whether they worked full-time or part-time. Each spreadsheet shows for each day of each week, including Saturdays, Sundays and holidays, whether each employee was present at work and if so, how many hours each employee worked. Thus, for example, the spreadsheets depict an employee at work for seven hours on a particular day as "7.00R" -- i.e. seven hours of work receiving regular pay. (*Id.*).

For days off, the spreadsheets show whether an employee received holiday pay, vacation pay or sick pay. Thus, for example, several employees are shown as receiving seven hours of holiday pay -- "7.00 H" -- for New Years Day, Monday, January 1, 1990. (Calendar Week 1 Spreadsheet, JA 28).

Next, the spreadsheets show the total number of hours for which each employee was compensated in each week. Thus, for example, the spreadsheet for Calendar Week No. 1 shows

that Ms. Walters was compensated for a total of 26.25 hours -- seven holiday hours on New Years Day, five regular hours on Tuesday, January 2 (also a company holiday), one regular hour on Wednesday, January 3 (the first regular working day of the week), no hours on Thursday, January 4, eight regular hours on Friday, January 5 (the last working day of the week), and 5.25 regular hours on Saturday, January 6. (*Id.*).

The spreadsheets show the total number of employees working daily on each of Metropolitan's official working days. Thus, for example, in Calendar Week No. 1, there were three working days, Wednesday, Thursday and Friday, and there were fifteen employees at work on each of those days. (*Id.*)

Finally, and significantly, the spreadsheets show the total number of employees on Metropolitan's payroll for each such week. For example, for Calendar Week No. 1, there were a total of sixteen employees -- one salaried, two part-time and thirteen full-time on Metropolitan's payroll. (*Id.*). Of course, that tabulation of employees on the weekly payroll is merely repetitive of what Metropolitan's regular payroll records already revealed. *See* discussion *supra*, pp. 5-6.

Work Patterns

The spreadsheets reveal significant details about the work patterns of Metropolitan's employees.

Midweek employee changes -- First, the spreadsheets show that there were nine weeks in which employees either joined or left Metropolitan's employ during midweek, *i.e.* other than starting on Monday or leaving on Friday.

The most pertinent example of such a midweek employment change event was the termination of petitioner Darlene Walters on Monday, April 23, 1990, in Week 17. (JA

44).

Significantly, other of the midweek changes coincided with the beginning and end of Metropolitan's payroll period, as follows: Week 14 - J. Frawley departs on Monday. (JA 41); Week 17 - S. Davis starts on Thursday (JA 44); Week 24 - W. Sallee starts on Friday, the first day of a payroll period (JA 51); Week 26 - A. Hunter departs on Thursday, the last day of a payroll period (JA 53); Week 29 - J. Wilds departs on Thursday, the last day of a payroll period (JA 56); Week 34 - L. Thome-Steiner departs on Monday (JA 61); Week 40 - D. Gendron & S. Gibson start on Friday, the first day of a payroll period (JA 67); Week 50 - P. Slevin departs on Thursday, the last day of a payroll period (JA 77).

Weekend hours -- Second, the spreadsheets show that at least one full-time or part-time employee was at work on almost every weekend of the year, especially on Saturdays, even though Saturdays and Sundays were not official working days and employees were not expected to be at work on those days. (Weeks 1, 2, 4, 5, 7, 8, 9-11, 13-33, 35-52; JA 28, 29, 31, 32, 34, 35, 36-38, 40-60, 62-79).

"Flextime" -- The spreadsheets show that while some employees worked a "regular" Monday to Friday workweek, others worked a more flexible schedule such as four days a week, one with longer hours with one day off. In Week 5, for example, R. Reno worked all five days for a total of 34.75 hours while A. Hunter worked only four days, Monday through Thursday, for 34.25 hours. (JA 32).

Make-up hours -- Third, the spreadsheets show that sometimes employees would miss days during the week but work on holidays or weekends: Week 1 - D. Walters (JA 28); Week 14 - D. Walters (JA 41); Week 17 - R. Freeman (JA 44);

Week 21 - R. Freeman (JA 48); Week 26 - A. Hunter (JA 53); Week 46 - D. Gendron (JA 73); Week 47 - C. O'Connor (JA 74) & Week 52 - H. Gomez (JA 79).

Part-time employees -- The company had two part-time employees -- Bernice Cunningham and Margaret Finney. (Stips. ¶ 10, JA 23). Both were on the payroll in all fifty-two weeks. Ms. Finney often worked only a few hours only four days during the workweek and six or more hours on Saturdays. Thus, like the other employees she typically worked five days a week, missing one day during the workweek and working one weekend day. (*See e.g.* Weeks 4, 5 & 10; JA 31, 32 & 37).

Salaried employee-- Mr. Bieber was Metropolitan's only salaried employee. (JA ¶ 9, JA 23). Neither the spreadsheets nor the underlying payroll records reflect the days that Mr. Bieber was present or absent from work. Nor do they show any sick or vacation days on which he may have been absent from work.

Workforce composition -- Although the record does not explicitly state the gender or national origin of Metropolitan's employees, the spreadsheets show that there were apparently several women employees and two or three persons with Hispanic surnames. (*See e.g.* Week 1, JA 28).

The Jurisdictional Result

These stipulated facts determined the jurisdictional outcome: Metropolitan did not meet the jurisdictional minimum under the *Zimmerman* day-by-day method because there were only nine weeks in 1990 and no weeks in 1989 in which fifteen or more employees were physically at work or on paid leave on each working day.

The Position of Ms. Walters and the EEOC

However, the EEOC and Ms. Walters asserted that the proper method to determine jurisdiction was to count the number of employees on Metropolitan's weekly payroll, a method of counting that has come to be known as the "payroll method." Because there were forty-seven weeks in 1990 in which Metropolitan had at least fifteen employees on its payroll for each working day, Metropolitan would fall within the jurisdictional reach of Title VII under the payroll method.

The EEOC urged the district court to adopt the payroll method because it was supported by Title VII's legislative history, by judicial authority from other circuits, by the EEOC's own administrative construction of Section 2000e(b), and by subsequent Congressional developments. (EEOC's Opp. to Mot. to Dism., R. 38). In contrast, Ms. Walters conceded that *Zimmerman* controlled and compelled dismissal, but stated her intention to seek the Seventh Circuit's reconsideration of that case and the adoption of the payroll method for the same reasons advanced by the EEOC. (Walters' Mem. on Motion to Dismiss, R. 39, p. 1).

The District Court's Ruling

The district court granted Metropolitan's motion to dismiss on the basis of *Zimmerman* and the stipulated facts. (Pet. App. 18a-19a). The court reasoned that *Zimmerman*, an ADEA case, controlled this, a Title VII case, because of the common purpose of Title VII and the ADEA and their virtually identical definitions of "employer." (*Id.*) Therefore, the court declined to adopt the payroll method of counting employees for the reason that it could not "modify Seventh Circuit precedent." (*Id.* at 17a).

The Ruling of the Court of Appeals

A panel of the court of appeals affirmed, holding that the arguments of Ms. Walters and the EEOC were not sufficiently compelling to overcome the *stare decisis* effect of *Zimmerman*. (Pet. App. at 5a-6a, 11a). Thus, the court held that hourly and part-time workers are to be counted as Title VII employees only on the days they are physically present at work or on paid leave. (*Id.* at 3a-4a, 6a). The court concluded that *Zimmerman*, an ADEA case, controlled because Title VII's definition of employer was virtually identical to that in the ADEA. The court ruled that the day-by-day method was compelled by the statute's plain text and was the only method that gave meaning to the phrase "for each working day." The court rejected the arguments about the conflicting authority from other circuits, the legislative history of Title VII, the subsequent legislative developments and public policy. Judge Ripple concurred in the panel's decision but expressed his doubts about "the correctness of *Zimmerman*." (Pet. App. 11a). Urging a definitive resolution of the conflict, he concluded that

> The ambiguity of the present situation ought to be clarified. The scope of Title VII ought to be the same in Boston and New Orleans as it is in Chicago. (*Id.* at 12a).

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, applies only to certain employers. It defines an employer as a "person . . . who has fifteen or more employees for each working day in each of twenty or more weeks in the current or preceding calendar year."

The plain text of that definition requires a count of all employees an employer "has . . . for each working day" of those weeks. The existence of the employment relationship is determinative. Nothing in the definition even remotely suggests that hourly employees are counted only for each working day they are physically present at work or on paid leave, the counting method approved by court of appeals herein.

The construction approved by the court of appeals engrafts unintended meanings onto the definition, destroys the internal coherence of Title VII and excludes from its coverage its intended beneficiaries. Moreover, that construction does not account for the changing realities of the American employment market.

If the statute is ambiguous, its legislative history commands that all employees be counted for each working day they are employees without reference to any other conditions or factors of employment. The Congressional debate clearly reinforces this interpretation.

Counting all employees on each day they are employed is a quick and easy way to determine jurisdiction. The contrary method approved by the court of appeals -- dependent as it is on additional factors such as presence at work, leave status, and method of compensation -- is complex, difficult, time-consuming and substantially burdensome, so much so that it defeats Title VII's essential legislative purposes of extending the prohibitions of employment discrimination as far as possible without imposing undue expense and burden on small businesses truly unable to bear those costs.

The judgment of the Seventh Circuit should be reversed and this case should be remanded for further proceedings.

ARGUMENT

THE JURISDICTIONAL DEFINITION OF "EMPLOYER" IN TITLE VII SHOULD INCLUDE ALL EMPLOYEES ON THE PAYROLL FOR EACH WORKING DAY OF A WEEK.

1. Introduction.

The question presented is how to determine the jurisdictional reach of the definition of "employer" in Title VII of the Civil Rights Act of 1964.

The prohibitions of Titie VII -- invoked in this case against gender discrimination and retaliation -- apply only to an "employer." 42 U.S.C. §§ 2000e-2 & 2000e-3. ("It shall be an unlawful employment practice for an **employer** to. . . "). (Pet. App. 22a-23a) (emphasis added). Section 701(b) of Title VII, 42 U.S.C. § 2000e(b), states that

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . (Pet. App. 20a).

Section 701(a) defines "person" as including "one or more individuals . . . [or] corporations . . . ." 42 U.S.C. § 2000e(a) (Pet. App. at 20a). In turn, Section 701(f) defines "employee" as "an individual employed by an employer . . . ." 42 U.S.C. § 2000e(f) (Pet. App. at 21a).

The jurisdictional definitions of other discrimination statutes are virtually identical. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b) (1988 & Supp. V 1993) (ADEA) (Pet. App. 24a); the Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(4)(A)(i) (Supp. V 1993)

(FMLA) (Pet. App. 28a); and Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12111(5)(A) (Supp. V 1993).

Two conflicting lines of decisions have arisen under Title VII and the ADEA regarding the proper method of determining which employees are within the jurisdictional definitions of employer. One line -- represented by the Seventh Circuit's decision herein and in *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983) (ADEA) -- adopts what is known as the "day-by-day method" that counts hourly-paid workers as employees for a working day only if physically at work or on paid leave on that day.[6] The other line -- represented by the First Circuit's decisions in *Vera-Lozano v. International Broadcasting*, 50 F.3d 67 (1st Cir. 1995) (Title VII) and *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633 (1st Cir. 1983) (Title VII) -- adopts what has come to be known as the "payroll method" that counts all workers for each working day they are on the payroll whether or not present at work or on

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[6] Other lower court decisions adopting or approving the day-by-day method are: *McGraw v. Warren County Oil Co.*, 707 F.2d 990 (8th Cir. 1983) (ADEA); *EEOC v. Garden and Assocs., Ltd.*, 956 F.2d 842 (8th Cir. 1992) (ADEA); *Goudeau v. Dental Health Services, Inc.*, 901 F. Supp. 1139, 1144-45 (M.D. La. 1995) (Title VII); *Richardson v. Bedford Place Housing Phase I Assocs.*, 855 F. Supp. 366 (N.D. Ga. 1994) (Title VII); *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ind. 1992) (ADEA and Title VII) (following but criticizing *Zimmerman*); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 34-35 (D. Me. 1992) (ADEA); *Norman v. Levy*, 756 F. Supp. 1060, 1063-64 (N.D. Ill. 1990), *supplemental opinion* 767 F. Supp. 1441 (N.D. Ill. 1991) (Title VII); *EEOC v. Argent Industries, Inc.*, 746 F. Supp. 705, 708-09 (S.D. Ohio 1989) (ADEA); and *Schoenbaum v. Orange County Center for the Performing Arts, Inc.*, 677 F. Supp. 1036, 1039 (C.D.Cal. 1987) (ADEA).

paid leave.[7]

The jargon "day-by-day" and "payroll" merely summarize more complicated inquiries. Both methods first inquire into which workers are "employees," and, second, count the number of employees to see if the jurisdictional minimum is met. *See Norman v. Levy*, 756 F. Supp. at 1062 (jurisdictional test is two step, first, determining employee status, and, second, counting number of employees).

In some cases, the first step is complicated, involving a look at the terms and conditions of employment to determine whether a worker fulfills the definition of employee. But this case presents no issue about employee status because the parties

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[7] Other decisions following the payroll method are: *Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 979 n. 7 (5th Cir. 1980) (Title VII); *Edwards v. Esau Investments, Inc.*, 66 Fair Empl. Prac. Cas. (BNA) 711 (D. Kan. 1994) (Title VII); *Shepherdson v. Local Union No. 401*, 823 F. Supp. 1245, 1251-52 (E.D. Pa. 1993) (Title VII); *Reith v. Swenson*, 63 Fair Empl. Prac. Cas. (BNA) 885, 897 (D. Kan. 1993) (Title VII); *Cohen v. S.U.P.A. Inc.*, 814 F. Supp. 251, 254-56 (N.D.N.Y. 1993) (ADEA); *Vano v. Au*, 1992 WL 175498 at *2 (W.D. Va. 1992); *Simmons v. Vliets Farmers Coop.*, 55 Fair Empl. Prac. Cas. (BNA) 1341, 1342 (D. Kan. 1991); *Gorman v. North Pittsburgh Oral Surgery Assocs., Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987) (ADEA); *Evans v. Davie Truckers, Inc.*, 38 Fair Empl. Prac. Cas. (BNA) 1553, 1554 (M.D.N.C. 1984) (Title VII), *aff'd*, 769 F.2d 1012, 1014 (4th Cir. 1985); *Lynn v. JER Corp.*, 573 F. Supp. 17, 20 (M.D. Tenn. 1983) (Title VII); *Hornick v. Borough of Duryea*, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980) (Title VII); *Pedreyra v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 941 (D. Colo. 1979) (Title VII); *Pascutoi v. Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl. Prac. Cas. (BNA) 1325, 1327 (D. Minn. 1975) (Title VII), *aff'd*, 566 F.2d 1178 (8th Cir. 1977).

have stipulated that certain of Metropolitan's workers (its office personnel) were employees, and that the rest (its dealer's representatives) were not employees.[8] (Stips. ¶ 8, JA 22-23; Supp. Stips. ¶¶ 2-11, JA 17-19). Nor does this case present an issue about what a "working day" is. The parties have stipulated that Metropolitan's working days were Monday to Friday, 9:00 a.m. to 5:00 p.m. (Stips. ¶ 6, JA 22). The court of appeals did not consider that question and it is not within the scope of the grant of *certiorari*.

Instead, the issue in this case involves the second step -- counting employees toward the jurisdictional minimum "for each working day." The question is: are all employees counted "for each working day" they are on the payroll, or are hourly-paid employees counted only "for each working day" they are physically present at work or on paid leave?

The jurisdiction of the district court turns on the method used. The parties agreed that the jurisdictional minimum was not met in 1989. (Stips. ¶ 13, JA 26). As for 1990, the district court and court of appeals applied the day-by-day method and held that Metropolitan was not a Title VII employer and that there was no jurisdiction because there were only nine weeks during which at least fifteen workers were present at work or on paid leave for each working day. (Stips.¶11, JA 23-24). Had the courts below used the payroll method, however, there would have been jurisdiction by a comfortable margin because Metropolitan had fifteen or more employees on the payroll for each working day of **forty-seven** weeks of 1990. (Stips. ¶ 12, JA 24-25).

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[8] Independent contractors are not Title VII employees. *See Wilde v. County of Kandiyohi*, 15 F.3d 103 (8th Cir. 1994).

Petitioner Darlene Walters respectfully urges that the payroll method is the only rational method of determining jurisdiction that is consistent with the text, legislative history and underlying public policy of Title VII and with sound judicial policy. The day-by-day method is completely unsupported in the statute's text or history, it engrafts a series of additional unintended and complicated meanings thereon, it is unduly cumbersome to apply and it drastically unsettles the construction of other important statutory schemes.

2. The plain text of the statute supports the payroll method.

Statutory construction begins and ends with the text of a statute if the meaning of that text is clear. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *see also Good Samaritan Hospital v. Shalala*, 113 S. Ct. 2151, 2157 (1993). When a statute speaks with clarity, judicial inquiry into its meaning is finished in all but the most extraordinary circumstances. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992).

Petitioner Darlene Walters respectfully submits that the text of Title VII's definition of "employer" is crystal clear under the payroll method and that the task of statutory construction should begin and end with that method.

a. The plain text of the statute specifies that the existence of an employment relationship determines an employee's inclusion in the jurisdictional count.

The plain text of Section 701(b) defines "employer" as a person who "**has** fifteen or more employees **for each working**

day" of the requisite number of weeks. (Pet. App. 20a) (emphasis added).

As several of the lower courts adopting the payroll method have noted, the word "**has**" connotes the existence of an employment relationship as determinative of a worker's inclusion within the jurisdictional count. *Thurber v. Jack Reilly's, Inc.* stressed that the statute and its legislative history focused on "the employment relationship," 717 F.2d at 634. *Pedreyra v. Cornell Prescription Pharmacies, Inc.* focused on the liberal construction of the term "employer" needed to fulfill the legislative purpose of eliminating discrimination and concluded that the proper counting method focuses "on the nature of the relationship of the employees." 465 F. Supp. at 941. *Wright v. Kosciusko Medical Clinic, Inc.* followed *Zimmerman*, but criticized it because the statutory definition covers any employee who that employer "has," again focusing on the existence of an employment relationship, not the days worked. 791 F. Supp. at 1331-32.

That focus is all the more emphasized by Title VII's broad definition of "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f) (Pet. App. 21a). That definition is not limited in any fashion by type of employee, working hours, type of compensation, presence at work or leave status. *Pedreyra*, 465 F. Supp. at 941. (" [S]tatute itself does not limit the definition of employee by the number of hours worked each day.").

The payroll method focuses on just that factor -- the existence of an employment relationship between the employer and the employee.

Thus, as simple as it may seem, the jurisdictional determination can be made by counting the number of

"employees" a "person" "has" "for each working day" of each "calendar week" of a year. If that "person . . . has fifteen or more employees for each working day in each of twenty or more calendar weeks," then that person is an employer and is subject to the jurisdiction of the federal courts under Title VII.

The meaning of the statute's text is plain.

b. Midweek employment changes, a common employment event, give full and complete meaning to the "for each working day" language.

A number of courts have concluded that **only** the day-by-day method gives meaning to the phrase "for each working day." The Seventh Circuit in this case so concluded, ruling that the most natural interpretation of "for each working day" "looks to the number of employees physically present at work on each day of the week." 60 F.3d at 1228 (Pet. App. 6a). The *Zimmerman* court concluded that any other reading rendered that clause "meaningless, redundant, or superfluous." 704 F.2d at 353. *See also Richardson v. Bedford Place Housing Phase I Associates*, 855 F. Supp. 366, 370 (N.D. Ga. 1994) ("Any other interpretation would render the words 'for each working day' superfluous.").

However, petitioner Darlene Walters respectfully submits that the payroll method gives the phrase "for each working day" life and meaning by accounting for the realistic and common situation when an employee enters or leaves employment midweek. Thus, for example, when an employee enters employment on a Tuesday of a Monday to Friday workweek, that employee is not a Title VII employee for that week because he or she is not an employee "for each working day" of that week, not having been an employee on Monday. Similarly, an employee who leaves employment on a Thursday is not a Title

VII employee "for each working day" of that week, having been employed for only four of the five days of that week, not including Friday.

Such midweek employment changes are hardly improbable or isolated occurrences. Given the complexities of the business world and changing employment needs, common sense counsels that midweek employment changes are a regular part of employment patterns. It is surely customary that employees begin and end their employment at the beginning and end of payroll periods, which, for example, are often pegged to the first and last days of a month. The first and last days of such payroll periods -- *e.g.* from October 1st to 15th and October 16th to 31st -- do not always fall on Monday and Friday, as they do not this year.

Moreover, such midweek employment changes are not fanciful. They occurred **nine** times in this case. Ms. Walters was terminated on Monday, April 23, 1990, and thus was not an employee "for each working day" of her last work week, calendar week 17 of 1990. (Week 17 Spreadsheet, JA 4-). In eight other weeks, other employees either started or left Metropolitan's employ during midweek, most at the beginning or end of its biweekly payroll period, which began on Friday and ended on Thursday of every other week. (*See* discussion *supra* pp. 10-11). Thus, construing the phrase "for each working day" to account for midweek employment changes gives the statute full meaning.

Nevertheless, without any real explanation, the court of appeals dismissed that construction as "a highly unlikely reading of the statute" because such midweek employment changes "are unlikely to occur with sufficient frequency to merit inclusion in a federal anti-discrimination statute." 60 F.3d at 1228. (Pet. App. 6a). The court's unstated assumption

seems to have been that employees almost always enter employment on Monday and terminate employment on Friday. Whatever the basis, the court's conclusion ignores the facts of this case, theoretical probabilities, and the infinite varieties of employment situations in the complex American employment market.

c. Midweek employment changes were specifically mentioned in the legislative history of the FMLA and appear in the FMLA's implementing regulations.

In fact, contrary to the court of appeals' conclusion, midweek employment changes are of sufficient importance to have merited specific Congressional and regulatory attention in the enactment and administration of a federal anti-discrimination statute.

As noted above, *supra*, p. 16, the FMLA's definition of employer includes precisely the same "for each working day" phrase as Title VII. 29 U.S.C. § 2611(4)(A)(i). (Pet. App. 28a). The House Report on the bill that eventually became the FMLA explicitly mentioned midweek employment changes:

> [A]n employee who begins employment, i.e., is added to the employer's payroll after the beginning of a workweek, or who terminates employment prior to the end of the workweek, will **not** count as being employed on "each working day" of such week.

House Committee on Education and Labor, Family and Medical Leave Act of 1993, H.R. Rep. No. 8, pt. 1, 103d Cong., 1st Sess. at 34 (1993) (emphasis added).

Moreover, the Department of Labor's regulations implementing the FMLA explicitly provide the same

definitional restriction for such midweek employment changes:

> An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

Final Regulations Implementing Family and Medical Leave Act, 60 Fed. Reg. 2179, 2240 (1995) (to be codified at 29 C.F.R. §825.105(d)) (Supp. Pet. App. 2a).

Thus, midweek employment changes are of sufficient importance to be included in a federal anti-discrimination statute and the implementing regulations.

Thus, the court of appeals erred in concluding that only the day-by-day method gives meaning to the phrase "for each working day." In fact, the payroll method gives full meaning to the phrase and recognizes common practical realities of the American employment market.

d. The day-by-day method engrafts complicated additional factors onto the statute not even remotely suggested by the plain text of the phrase "for each working day."

Next, whereas the payroll method is simple in concept and brings no additional gloss or meaning to the definition of employer, the day-by-day method engrafts a complicated set of additional factors onto the phrase "for each working day."

For example, an employee's payroll status becomes an essential inquiry because salaried workers are counted for each working day whether present at work or not. *Zimmerman*, 704 F.2d at 353. Leave status of hourly workers requires

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1 EEOC Compliance Manual 605.8(b) *Does Respondent Employ 15 or More Employees* (BNA) 605:021 38

3 EEOC Compliance Manual (BNA), *Policy Guidance: Whether part-time employees are within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, N:3311-N:3316 ..... 35, 36

Equal Employment Opportunity Commission, *Legislative History Of Titles VII and XI Of The Civil Rights Act Of 1964* (1968) 22, 25

OPINIONS BELOW

The opinion of the court of appeals (95-259 Pet. App. 1a-12a) is reported at 60 F.3d 1225. The district court's opinion (95-259 Pet. App. 13a-19a) is reported at 864 F.Supp. 71.

JURISDICTION

The court of appeals entered its judgment on July 18, 1995. Darlene Walters filed a petition for a writ of certiorari on August 14, 1995. *Walters v. Metropolitan Educational Enterprises, Inc.*, No. 95-259.

On October 10, 1995 Justice Stevens extended the time for the Solicitor General to file a petition for a writ of certiorari to and including November 15, 1995. The Solicitor General filed a petition for a writ of certiorari on behalf of the EEOC on November 15, 1995. *Equal Employment Opportunity Commission v. Metropolitan Educational Enterprises, Inc.*, No. 95-779.

The Court granted both petitions for a writ of certiorari and consolidated the cases on March 18, 1996. 116 S. Ct. 1260. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964 defines the term "employer" as follows:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . .

42 U.S.C. § 2000e(b).

STATEMENT OF THE CASE

Metropolitan Educational Enterprises sells encyclopedias, dictionaries and other educational materials to retail customers throughout the United States. J.A. 15, 17.[1] Leonard Bieber is the president of Metropolitan. J.A. 23. Darlene Walters worked for Metropolitan as a collector from January 3, 1986 until she voluntarily resigned on Tuesday, April 10, 1990. R. 12 at 2; R. 20 at 7.[2]

On Friday, April 13, 1990, Walters returned to Metropolitan and asked to be rehired. R. 12 at 7-8. Metropolitan allowed Walters to return to work. R. 12, at 7-8. Before she returned to work, however, Walters had filed a charge

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[1] Citations to the Joint Appendix are designated "J.A." followed by the page number where appropriate.

[2] Citations to the Record are designated "R. #." References are to the district court's docket sheet and, where appropriate, to the page number.

of discrimination with the EEOC alleging that Metropolitan had denied her a promotion to the position of credit manager on account of her sex in September, 1989.[3] See R. 12, at 3-4; J.A. 20-2; EEOC Brief at 3.

On Monday, April 23, 1990, Metropolitan terminated Walters for unsatisfactory job performance. R. 12 at 7-8. Walters filed a second charge of discrimination, this time alleging that Metropolitan discharged her in retaliation for having filed the initial charge. R. 12 at 3-4.

Efforts at conciliation failed and the EEOC filed suit against Metropolitan and Bieber in the district court on April 7, 1993. R. 1, at 2. The EEOC alleged that Metropolitan and Bieber had retaliated against Walters in violation of Section 704(a) of Title VII of the Civil Rights Act of 1964 by discharging her for having filed a charge of discrimination. R. 1 at 3. Walters intervened as a matter of right under 42 U.S.C. § 2000e-5(f)(1) and Rule 24(a)(1) of the Federal Rules of Civil Procedure. R. 10. Her amended complaint reiterated the EEOC's retaliation claim. R. 12 at 3-4. Walters further alleged that Metropolitan had failed to promote her to the position of credit manager solely on account of her sex in violation of Section 703 of Title VII. R. 12 at 2-3. Finally, Walters alleged pendent claims for breach of contract and common law retaliatory discharge under Illinois law. R. 12 at 4-5.

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[3] The EEOC investigated this charge and determined that the evidence did not establish a violation because the individual Metropolitan had promoted was better qualified for the job. *See* Walters' Brief at 4 n.3.

Metropolitan and Bieber denied the material allegations of the complaints, including the allegations that each was an "employer" within the meaning of Title VII of the Civil Rights Act of 1964. R. 2 at 3; R. 3 at 3-4; R. 20 at 2; R. 21 at 2. They moved to dismiss the complaints for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. R. 25. They contended that neither Metropolitan nor Bieber was an "employer" subject to the provisions of Title VII.[4] R. 26, at 3.

Section 701(b) of the Civil Rights Act of 1964 defines "employer" to mean "a person engaged in an industry affecting commerce who has at least fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). Respondents argued that Metropolitan did not employ fifteen or more employees on each working day in each of twenty or more calendar weeks in either 1989 or 1990. R. 26, at 3-5.

Respondents relied upon the district court's previous decision in *Norman v. Levy*, 767 F.Supp. 1441, 1449 (N.D.Ill. 1991). In *Norman v. Levy*, the district court applied the counting method that the Seventh Circuit had articulated in *Zimmerman v. North American Signal Co.*, 704 F.2d 353 (7th Cir. 1983). In *Zimmerman*, the Seventh Circuit held that hourly paid workers are not to be counted as "employees for days when they were neither working nor on paid leave." *Id.* at 354. The court reserved and

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[4] Respondents also moved to dismiss Walters' pendent claims for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1367(a). R. 26 at 5-6.

expressed no opinion on several issues that were not necessary for its conclusion. *Id.* at 354 n.6. Those issues included the method of counting *hourly paid workers on paid leave,* and the method of counting salaried workers. *Id.*

Counsel for respondents supervised the review and analysis of Metropolitan's time cards and biweekly payroll worksheets and registers for 1989 and 1990 in accordance with the procedure the district court had previously followed in *Norman v. Levy.*[5] *See* R. 25 following Tab 5. Respondents' counsel oversaw the preparation of a detailed weekly analysis of Metropolitan's payroll records for each calendar week of 1989 and 1990. R. 26 following Tab 5. The worksheets listed the name of each employee on Metropolitan's payroll for each calendar week, and for each day of the week, the number of hours each employee worked or for which he or she received holiday pay, sick pay or vacation pay. *See* R. 26 following Tab 5.

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[5] The district court addressed the proper method of counting employees for purposes of Section 701(b) of Title VII. *Norman v. Levy,* 756 F.Supp. 1060 (N.D. Ill. 1990). There, the court attempted to apply the counting method the Seventh Circuit had articulated in *Zimmerman v. North American Signal Co.,* 704 F.2d 347 (7th Cir. 1983). The district court entered and continued the defendant's motion to dismiss because the evidence the parties initially presented left the court "unable to make a finding either way as to its jurisdiction." *Norman,* 756 F.Supp. at 1065. The court also requested that the parties "submit further evidence and a new employee count" in a manner consistent with the Seventh Circuit's approach in *Zimmerman, id.*

Respondents counted all of Metropolitan's hourly paid employees for each working day they worked, regardless of the number of hours worked. Respondents also counted Metropolitan's hourly employees for each working day they were on paid leave. Metropolitan's only salaried employee, Bieber, was counted for each working day of the year. This approach, while more inclusive than that mandated by the Seventh Circuit's holding in *Zimmerman* produced a similar result. Metropolitan did to have fifteen or more employees at work or on paid leave for each working day in each of twenty or more calendar weeks in either 1989 or 1990. R. 26, at 2-3.

Petitioners successfully moved to strike the weekly payroll analysis respondents' counsel had prepared and then undertook discovery. R. 31; 63-2. Much of the discovery in this case focused upon whether independent sales representative were "emplyees" within the purview of Section 701(f) of Title VII.[6] The remaining discovery consisted of the production of Metropolitan's payroll records.

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[6] Petitioners' request for production called for the production of nearly 3,000 pages of documents. Approximately one half of these documents related to Metropolitan's independent sales representatives. The documents included those individuals' applications and contracts with Metropolitan, their 1099 forms for the years 1989 and 1990, and even records relating to their sales of merchandise and the commissions they earned. Mr. Bieber's deposition lasted for more than two full days, during which much of the petitioners' interrogation centered around the nature of Metropolitan's relationship with its independent sales representatives. Ultimately, Walters stipulated that Metropolitan's sales representatives were not "employees." R. 40 at ¶¶ 2-11.

After completing discovery, the parties prepared a second set of weekly summaries similar to the analysis Metropolitan had appended to its motion to dismiss. J.A. 28-79. Based upon the analysis of Metropolitan's 1990 payroll records, the parties stipulated to the following facts.

> 1. There were only nine calendar weeks during 1990 during which Metropolitan had 15 or more employees working or on paid leave on each working day. J.A. 23-24 at ¶ 11.
>
> 2. During the remaining 43 calendar weeks of 1990, Metropolitan did not have 15 or more employees working or on paid leave on each working day. J.A. 24 at ¶ 11.
>
> 3. Finally, there were 15 or more employees on Metropolitan's payroll during 47 calendar weeks of 1990. J.A. 24 at ¶ 12.

The parties submitted the weekly summaries and their stipulations to the district court. 95-259 Pet. App. 15a. The EEOC urged the court to count the number of employees on Metropolitan's payroll. R. 38, at 5-7. The district court noted that circuit precedent supported respondents' counting method and granted their motion to dismiss. 95-259 Pet. App. 13a-19a.

The court of appeals affirmed. 95-259 Pet. App. 1a-12a. The court reaffirmed its earlier holding in *Zimmerman id.* While *Zimmerman* gave the phrase "for each working day" "its most natural interpretation." The panel rejected the petitioners' proposed interpretation of the phrase "for each working day" finding it "highly unlikely" because the "instances where employees begin work on Wednesdays or depart on Thursdays are

unlikely to occur with sufficient frequency to merit inclusion in a federal antidiscrimination statute." *Id.*

SUMMARY OF THE ARGUMENT

Congress defined "employer" to limit the application of Title VII to those persons who "ha[ve] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). The plain language of the definition is correctly interpreted to count employees for each day when they are at work. The payroll method urged by the petitioners, on the other hand, renders the phrase "for each working day" meaningless. Petitioners' inconsistent interpretation of the payroll method illustrates its failure to give the phrase "for each working day" the meaning they ascribe.

In the absence of a clear legislative intent to the contrary, the definition must be interpreted as it was written. The sparse legislative history that relates specifically to the phrase "for each working day" does not support petitioners' interpretation. The daily method is consistent with congressional intent to exclude small employers from Title VII. Since the definition is jurisdictional, it should be strictly construed.

This Court owes no deference to the EEOC's interpretation. As noted above, the language of the statute is plain and it defines the scope of the EEOC's jurisdiction. Finally, the EEOC's interpretation of the payroll method has been inconsistent, even during this course of this

litigation. Thus, deference to its Policy Guidance would be inappropriate.

ARGUMENT

I. While The *Zimmerman* Method Is Consistent With The Plain Meaning Of The Statute And Gives Effect To The Phrase "For Each Working Day," The Payroll Method Does Not.

Petitioners contend that the plain meaning of Title VII supports the payroll method. They maintain that the payroll method's emphasis upon the existence of the employment relationship gives effect to the phrase "for each working day." The petitioners' proposed interpretation does not comport with the common understanding of the plain language of the statute. Indeed, their interpretation renders the phrase "for each working day" superfluous. Moreover the petitioners' application of the payroll method fails to give effect to their proposed interpretation of the phrase "for each working day." Finally, the fact that Title VII has a remedial purpose is insufficient to overcome the meaning of the plain language of the statute.

A. The Plain Language Of Title VII Supports The Interpretation Of The Courts Below And Militates Against The Payroll Method.

When interpreting a statute, a court must begin with the language of the statute itself. *E.g., Estate of Cowart v. Nickols Drilling Co.*, 505 U.S. 469, 476 (1992); *Consumer*

Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). If the statute is clear and unambiguous, as it is in this case, the language must be regarded as conclusive and judicial inquiry into the meaning of the statute is finished. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). For purposes of Title VII, Congress defined an "employer" as "any person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks." 42 U.S.C. § 2000e(b). Petitioners rely heavily upon the definition's use of the verb "has" to conclude that the definition contemplates the existence of an employment relationship. The definition might be construed as petitioners suggest, at least when the verb "has" is read in isolation. But statutory language must not be read in isolation because its meaning depends upon its context. *Shell Oil Co. v Iowa Department of Revenue*, 488 U.S. 19, 25 (1988). Judge Learned Hand explained this cardinal canon of statutory construction as follows:

> "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used."

NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941). Thus, the "relevant phrase in the definitional part of the statute must be read in its entirety." *Gustafson v. Alloyd Co., Inc.*, ___ U.S. ___, 115 S.Ct. 1061, 1069 (1995).

Title VII's definition of "employer" does not speak merely in terms of the number of employees a person "has." When read in its entirety, the definition speaks in

terms of the number of employees a person "has" "for each working day in each of twenty or more calendar weeks." Respondents' interpretation of the definition is consistent with, and gives meaning to the plain language of the statute. Petitioner's interpretation, on the other hand, renders the phrase "for each working day" meaningless surplusage. In an attempt to avoid that result, petitioners ascribe a strained meaning to the phrase "for each working day," suggesting that the phrase excludes employees whose "employment relationship" began or ended during a calendar week. *See* EEOC Brief at 22; Walters' Brief at 22-23. The Seventh Circuit rejected this interpretation as "highly unlikely." The court found that the instances of employees beginning or ending work midweek were "unlikely to occur with sufficient frequency to merit inclusion in a federal anti-discrimination statute." *EEOC v. Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225, 1228 (7th Cir. 1995).

In common parlance, if an employer were asked how many employees he "has" on any given day, he would probably count the time cards next to the company's time clock. The resulting count would include each hourly-paid employee, whether he worked that day or not, and if so, without regard to the number of hours worked. This counting method would necessarily exclude any individual who was not in an employment relationship with the employer on a given day. Thus, persons who had not yet begun, or who had already terminated their employment relationship with the employer, would not be counted. If the employer repeated this process for each working day of a given week, the resulting tally would include each hourly-paid employee with whom the employer had an

employment relationship without regard to the number days or hours that employee actually worked during the week. This method would produce the same result as the payroll method petitioners' now propose before this Court. Thus, petitioners' suggested interpretation of the phrase "for each working day" adds nothing to Title VII's statutory definition of "employer." Courts should not construe a statute in a way that renders words or phrases meaningless, redundant or superfluous.

But if the same employer were asked how many employees he or she "has" "for each working day in [a given] calendar week," he would probably adopt a different counting method. The employer would probably gather the company's time cards for the week in question and then, "for each working day," tally the number of employees who actually worked – even if for only a portion of the day. The Seventh Circuit found this to be "the most natural interpretation of the phrase ['for each working day']." *EEOC v. Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225, 1228 (7th Cir. 1996); *see also Zimmerman v. North American Signal Co.*, 704 F.2d 347, 353-54 (7th Cir. 1983).

B. Petitioners' Application Of The Payroll Method Is At Odds With Their Interpretation Of The Payroll Method Before This Court And Fails To Give Effect To The Phrase "For Each Working Day."

Walters offers two examples to illustrate how application of the payroll method gives effect to the phrase "for each working day." In Walters' first scenario, a new

employee is hired and begins working on Tuesday. Walters' Brief 22. Because he did not start work until Tuesday, this individual was not an employee "for each working day" of the "calendar week." Accordingly, this individual would not be counted in the week he began his employment. Walters' Brief at 22. The second hypothetical involves an employee who terminates her employment on a Thursday. Walters' Brief at 22. Since the employee terminated her employment on the fourth "working day" of the "calendar week," she was not an employee "for each working day" of that week. Thus, she should not be counted in the week her employment was terminated. Walters' Brief at 22-23.

Petitioners took a decidedly different approach when they applied the payroll method in the courts below. Each of the weekly payroll summaries included in the Joint Appendix indicates the "Number of Employees on [Metropolitan's] Weekly Payroll." *See, e.g.*, J.A. 43. For each and every week, the number indicated corresponds to number of persons whose names appeared on Metropolitan's payroll. Thus, petitioners counted employees who began employment after Monday and those who terminated their employment before Friday just as if their employment relationship existed "for each working day" of the calendar week their employment began or ended. Petitioners' own application of the payroll method in this case renders the phrase "for each working day" meaningless. Moreover, their application of the payroll method is at odds with the interpretation they now ascribe to that phrase in this Court.

Petitioners' analysis of the week beginning April 23 best illustrates their application of the payroll method in

the courts below. Metropolitan began that week with fifteen persons on its payroll. *See* J.A. 43. There were two "midweek employment changes"[7] during that week. Petitioner Walters was terminated on Monday April 23. (J.A. 44) Since her employment relationship with Metropolitan ended on the first "working day" of the week, Walters no longer stood in an employment relationship with Metropolitan for the remaining four "working days" of the "calendar week." *Cf.* Walters' Brief at 22-23. Metropolitan had an ongoing employment relationship with only 14 employees "for each working day" during the rest of that week. Shyanne Davis began working for Metropolitan on Thursday, April 26 – the fourth "working day" of the "calendar week." Walters' Brief at 11; (J.A. 44). Thus, like Walters, Davis did not have an employment relationship with Metropolitan "for each working day" of that calendar week. *Cf.* Walters' Brief at 22. Nevertheless, petitioners counted both Walters and Davis "for each working day" of the calendar week of April 23 when neither had an employment relationship with Metropolitan "for each working day" of that week. As a result, the weekly payroll summary indicates that Metropolitan had 16 employees "on [its] weekly payroll," when it had an employment relationship with only 14 employees "for each working day" during that week. *See* J.A. 44. Petitioners included this week among those they maintain should be counted toward the jurisdictional minimum. *See* J.A. 24-25 at ¶ 12 ("there were fifteen (15) or more

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[7] Petitioners use this term to describe those situations in which an employee either joins or leaves an employer's workforce midweek, *i.e.*, other than starting on Monday or leaving on Friday. Walters' brief at 10, 22-23.

employees *on [Metropolitan's] payroll* during each of the following calendar weeks: . . . April 23 to April 27. . . . ") (emphasis added). Contrary to the position they take before this Court, Petitioners consistently counted employees for each week their names appeared on the payroll, including weeks when an employee did not stand in an employment relationship with Metropolitan "for each working day" of the week.[8] Petitioners' application of the payroll method in the courts below stands in

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[8] The week beginning April 2, 1990 again illustrates how the petitioners' application of the payroll method erroneously increased the jurisdictional count. James Frawley left Metropolitan's employment on Monday April 2, 1990 – the first "working day" of the calendar week. (JA 41); *see also* Walters' Brief at 11. After Mr. Frawley had terminated his employment, Metropolitan had only fourteen employees on its payroll for each of the remaining days of the week. Yet, petitioners counted Mr. Frawley as the pivotal fifteenth "for each working day" of the remainder of the week, apparently ignoring the fact that his "employment relationship" had been terminated. *See* (JA 53) ("Number of Employees on Weekly Payroll – 15") (JA 24-25 at ¶ 12) (counting the week of April 2 through April 6 among the weeks "there were fifteen (15) or more employees *on [Metropolitan's] payroll.*") (emphasis added.)

The week of June 11 provides yet another example. Metropolitan began that week with a total of fourteen employees on its payroll. (JA 51) Wayne Sallee began working for Metropolitan on the last working day of the week – Friday June 15. (JA 51); *see also* Walters' Brief at 11. Since Metropolitan and Mr. Sallee did not have an employment relationship "for each working day" of the week of June 11, petitioners should not have counted him for that week. *See* Walters' Brief at 22, 25. Nevertheless, petitioners counted Mr. Sallee as Metropolitan's fifteenth employee "for each working day" of that week, thereby adding yet another week to their jurisdictional count. *See* JA at 51 ("Number of Employees on Weekly Payroll – 15"); (JA at 24-25 ¶ 12) (counting the week of June 11 to June 15

stark contrast to the payroll method petitioners espouse before this Court.

C. Settled Principles Of Statutory Construction Favor A Strict Construction Of Section 701(b) And Militate Against The Payroll Method.

Petitioners urge this Court to construe the definition of "employer" liberally because Title VII is a remedial statute. Their analysis overlooks the plain meaning of the

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among the weeks when "there were fifteen (15) or more employees *on [Metropolitan's] payroll*") (emphasis added).

The stipulations and weekly summaries printed in Joint Appendix reveal that for each week a person either started or left Metropolitan's employ, petitioners' application of the payroll method contradicts the position they have taken before this Court. Aaron Hunter left Metropolitan's employ on Thursday, June 28; yet, petitioners counted him as Metropolitan's fifteenth employee for "each working day" of that week. *See* Walters' Brief at 11; (JA 53); (JA 24-25 at ¶ 12). Joseph Wilds left Metropolitan on Thursday, July 19. (JA 56) Still, petitioners counted him "for each working day" of that week. *See* Walters' Brief at 11. (JA 24-25, 56). Lizbet Thome-Steiner's last day with Metropolitan was Monday, August 20. Walters' Brief at 11; (JA 61). Petitioners counted her "for each working day" through Friday, August 24. (JA 24-25, 61). On Friday October 5, Derek Gendron and Scott Gibson began working for Metropolitan. Walters' brief at 11; (JA 67). Once again, petitioners counted both of these individuals "for each working day" of a week even though their employment relationship with Metropolitan did not begin until Friday - the last "working day" of that week. (JA 24-25, 67). Finally, Paul Slevin left Metropolitan on Thursday, December 13, (Walters' brief at 11; (JA 77)), but was counted "for each working day" of that week (JA 24-25, 77).

statute and invites an unwarranted expansion of federal subject matter jurisdiction.

Title VII is indeed remedial legislation. Generalized references to the remedial purposes of a statute do not afford the judiciary sufficient justification to read a provision more broadly than its language permits. *Aaron v. SEC*, 446 U.S. 680, 695 (1980); *see also* 3 N. Singer, *Sutherland's Statutory Construction* § 60.01 at 148 (1984). As respondents have demonstrated, the plain meaning of the statute supports their interpretation of the definition of "employer." This Court should therefore decline petitioners' invitation to read that provision more broadly than Congress intended.

Moreover, a person's status as an "employer" determines whether an employee is entitled to a federal forum for redress of discrimination in employment. Thus, section 701(b) of Title VII is not only a definitional statute, but in a broader sense, a jurisdictional one.[9] As such, it must be strictly construed. *E.g., Healy v. Ratta*, 292 U.S. 263, 270 (1934) (federal courts should "scrupulously confine their own jurisdiction to the precise limits" defined by Congress.) This Court has expressed its "deeply felt

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[9] Title VII's strictures against discriminatory and retaliatory conduct retaliation apply only to "employers," as that term is defined in Section 701(b). *See* 42 U.S.C. §§ 2000e-2(a); 2000e-3(a). Section 706(f)(1) authorizes the EEOC to bring a civil action to redress alleged violations of Title VII. 42 U.S.C. § 2000e-5(f)(1). Section 706(f)(3) vests the district court with jurisdiction of actions commenced under Title VII. 42 U.S.C. § 2000e-5(f)(3). Thus, whether the EEOC may commence an action in the district court depends upon whether the putative defendant is an "employer."

and traditional reluctance . . . to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). Guided by these cardinal canons of statutory construction, the Fifth Circuit strictly construed Title VII's definition of "employment agency" in *Greenlees v. Eidenmuler*, 32 F.3d 197, 200 (5th Cir. 1994). This Court should decline petitioners' invitation to expand federal subject matter jurisdiction by construing the definition of "employer" more broadly than its plain meaning permits.

II. The Legislative History Of Title VII Does Not Provide A Clear Indication That Congress Intended That The Payroll Method Be Applied.

The plain meaning of Title VII's definition of "employer" supports respondents' view that hourly-paid employees be counted only on those days when they actually work. Accordingly, consideration of legislative history is neither useful nor appropriate. *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987).

Should this Court conclude that exceptional circumstances warrant its consideration of legislative history to ascertain Congressional intent, it should proceed with caution. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977). Petitioners present a lengthy analysis of the legislative history of Title VII. Stripped of its irrelevant detail, petitioners' argument rests on a few passing general references in the legislative debates. Much of the legislative history Petitioners' rely upon preceded the Senate

amendment that added the phrase "for each working day in each of twenty or more calendar weeks." The history of that amendment is sparse. And what little history there is provides no specific explanation for the phrase "for each working day." The history does, however, reveal a broader Congressional intent to count hourly-paid workers only when they actually work.

A. The Legislative History Of Title VII Lacks The Sources Of Congressional Intent This Court Has Historically Deemed Authoritative – Reports Of Congressional Committees That Drafted And Studied The Legislation.

Title VII traces its roots to H.R. 7152, 88th Cong., 1st Sess. (1963), a bill introduced in the House of Representatives on June 20, 1963.[10] On February 10, 1963, the House passed a version of the bill that defined"employer" as:

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[10] A subcommittee of the Judiciary Committee of the House of Representatives prepared a substitute for H.R. 7152. After offering the substitute and moving for its approval, the Chairman of the Judiciary Committee announced that no amendments to his proposal could be offered, that no debate would be had and that no questions would be permitted or answered. H.R. Rep. No. 914, 88th Cong. , 1st Sess. 63 (Minority Report Upon Proposed Civil Rights Act Of 1963, Committee On Judiciary Substitute For H.R. 7152). The bill was read without opportunity for amendment. *Id.* Several members of the committee repeatedly sought recognition to ask questions or offer amendments, but the Chair refused to recognize those members of the committee. *Id.* In all, the bill was discussed for a total of only two minutes, with one minute being allotted to the ranking minority member and the other reserved to the Chairman. *Id.* Neither of these members yielded to any other member of the committee. *Id.* Both the Chairman and the ranking member of the minority confined their terse remarks to

> "a person engaged in an industry affecting commerce who has twenty-five or more employees, and any agent of such a person . . .

H.R. Rep. No. 914, 88th Cong., 1st Sess. 9 (1963). The EEOC maintains that several Congressmen understood this definition of "employer" to include all employees on an employer's payroll regardless of their work schedules.[11]

Four months after the House had adopted H.R. 7152, the Senate amended the definition of "employer" by adding the phrase "for each working day in each of twenty or more calendar weeks." *See* Amendment No. 656 to H.R. 7152 in the Nature of a Substitute, *reprinted at* 110 Cong. Rec. 11,926 (1964); *see also* 110 Cong. Rec. 12,811-12,817 (1964) (text of H.R. 7152 annotated to indicate changes made by Senate amendment No. 656). Common sense dictates that whatever might be gleaned from several Congressmen's interpretation of H.R. 7152 *before* it was amended in the Senate provides little evidence of what Congress intended when it adopted the Senate amendment to the definition of "employer." Put another

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their support of the bill. *Id.* During the brief discussion of the bill, there was no attempt to explain the provisions of the bill. *Id.* The committee neither debated nor permitted the opportunity to debate the bill. *Id.*

[11] This interpretation appears to be consistent with the plain language of H.R. 7153 as it was reported and passed by the House. Moreover, this interpretation of the definition of "employer" *without* the phrase "for each working day" is also consistent with Petitioners' application of the payroll method in the courts below.

way, whatever Congressman Abernathy and his colleagues understood H.R. 7152 to have meant *before* the Senate amended the bill could not have reflected what Congress intended when it added the phrase "for each working day."

The EEOC's reliance upon the legislative history before the Senate amendment added the phrase "for each working day" is misplaced. This Court has accorded little weight to the isolated remarks of a single legislator. *E.g., Weinberger v. Rossi,* 456 U.S. 25, 35 (1982). Nor has the Court accorded much weight to the statements of a bill's opponents. *Shell Oil Co. v. Iowa Department of Revenue,* 488 U.S. 19, 29 (1988).

Nor does legislative history of the Senate amendment to H.R. 7152 provide any authoritative indication of what Congress meant when it added the phrase "for each working day" to the definition of "employer." When faced with questions of legislative intent, this Court has demonstrated its strong preference for Congressional Committee Reports over the isolated remarks of legislators during debate. Repeatedly, the Court has recognized that "the authoritative source for legislative intent lies in the Committee Reports on [a] bill." *E.g., Thornburg v. Gingles,* 478 U.S. 30, 43 n. 7 (1986); *Garcia v. United States,* 469 U.S. 70, 76 and n. 3 (1984); *Zuber v. Allen,* 396 U.S. 168, 186 (1969). The Court's reliance upon committee reports rests upon the following rationale:

> A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.

Zuber v. Allen, 396 U.S. at 186 (1969). The legislative history of Title VII does not include a single committee report that explains why Congress added the phrase "for each working day" to the definition of "employer."[12] Even Senator Dirksen, one of the co-sponsors of the bill, attributed his own confusion to the absence of Senate committee hearings and reports. 110 Cong. Rec. 6450, 7215-7216 (1964).[13] Most notably missing from the

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[12] After H.R. 7152 passed the House it was referred to the full Senate rather than to the Senate Judiciary Committee as was the usual and customary procedure. The EEOC's editorial commentary to its *Legislative History of Title VII* suggest that supporters of the measure in the Senate considered members of the Judiciary Committee hostile to the bill. Equal Employment Opportunity Commission Legislative History of Titles VII and XI of the Civil Rights Act of 1964. As a result, there is no report from the Senate Judiciary Committee. The Dirksen-Mansfield amendment was the product of an informal bipartisan conference. *Id.* at 3001. Accordingly, no committee reported on the Senate substitute. Since the Dirksen-Mansfield substitute amended the House Bill, a conference committee would have resolved any differences between the bills including the Senate amendment adding the phrase "for each working day." No conference report was ever prepared. Thus, what would have been the most illuminating source of legislative history is lacking. *Id.* at 3001; 2A N. Singer, *Sutherland's Statutory Construction*, § 48.08 at 340 ("Since the conference report represents the final statement of terms agreed to by both houses of Congress, next to the statute itself, it is the most persuasive evidence of Congressional intent.")

[13] "Reliance upon legislative history is hazardous at best, but when 'not even the sponsors of the bill knew what it meant,' . . . such reliance cannot form a reasonable basis on which to interpret the text of a statute." *Westside Community Schools v. Mergens*, 496 U.S. 226, 242-43 (1990) Title VII's legislative history has similarly frustrated some courts. In

legislative history is a conference report reconciling the differences between the House Bill without the phrase "for each working day" and the Senate substitute including the amendment. Courts and a leading commentator agree that "the Conference Report . . . is the most persuasive evidence of congressional intent besides the statute itself." *E.g., Resolution Trust Corp. v. Gallagher,* 10 F.3d 416, 421 (7th Cir. 1993); *Demby v. Schweiker,* 671 F.2d 507, 510 (D.C.Cir. 1981); 2A N. Singer, *Sutherland's Statutory Construction,* § 48.08 at 340.

The only remaining source of legislative history consists of the isolated remarks of Senator Dirksen during the Senate debate. Walters erroneously characterizes Senator Dirksen's remarks as the "most powerful and persuasive history imaginable." Walters' Brief at 37. Unlike committee reports, floor debates merely "reflect at best the understanding of individual Congressmen." *Zuber v. Allen,* 396 U.S. at 186 (1969). Justice Jackson cautioned against reliance upon such debates, noting that Congressional debate is "not always distinguished for candor or accuracy." *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring); Guided by these principles, this Court has historically accorded little weight to the comments of even the sponsor of legislation. *E.g., Weinberger v. Rossi,* 456 U.S. 25, 35 and n. 15 (1982); *Consumer Product Safety Commission v. GTE*

Sanchez v. Standard Brands, Inc. 431 F.2d 455, 460 (5th Cir. 1970), for example, the court found that "the legislative history of Title VII is in such a confused state that it is of minimal value in its explication." *See also EEOC v. Missouri Pacific Railroad Company,* 493 F.2d 71, 74 (8th Cir. 1974).

Sylvania, Inc., 447 U.S. 102, 118 (1980); *Chrysler Corp. v Brown*, 441 U.S. 281, 311 (1979). A thorough analysis of Senator Dirksen's remarks in their context fails to clarify what Congress intended when it inserted the phrase "for each working day."

Senator Dirksen explained that the amendment grew out of his concern that the definition might not be sufficiently specific. 110 Cong. Rec. 6450, 7216 (1984)[14]. In particular, the Senator was concerned that agricultural and seasonal employers, who might augment their workforce for only a few weeks of the year, would be subject to Title VII. 110 Cong. Rec. 6450 (1964).

Senator Dirksen later explained that the amendment was intended to exempt such employers:

> [T]he House bill was modified in some particulars. In the first place, we undertook to provide for seasonal workers, by taking the language out of the Unemployment Compensation Act, to the effect that the definition of the term "employer" would apply to 25 or more who were employees for each working day, in each of 20 or more calendar weeks, in the current or preceding calendar year.

110 Cong. Rec. 13087 (1964). The phrase "in each of twenty or more calendar weeks" was plainly intended to exempt seasonal employers from Title VII. How the

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[14] Senator Dirksen raised a number of questions concerning the specificity of the definition of employer. 100 Cong. Rec. 6450 (1964). He later drafted a memorandum setting forth his specific questions and concerns. 100 Cong. Rec. 7216-7217 (1964).

phrase "for each working day" also furthers that legislative purpose is entirely unclear.

Petitioners and some of the lower courts[15] have seized upon Senator Dirksen's isolated remark[16] that Congress had borrowed the definition from the Unemployment Act. As at least one lower court has recognized, "Senator Dirksen's assertions . . . are not borne out in the comparison" of the two provisions. *Richardson v. Bedford Place House Phase I Associates*, 855 F.Supp. 366, 369 (N.D. Ga. 1994). The Unemployment Act stated:

> [T]he term "employer" does not include any person unless *on each of some twenty days during the taxable year, each day being in a different calendar week;* the total number of individuals who are *employed by him in employment for some portion of the day* (whether or not at the same moment in time) was four or more."

26 U.S.C. § 3306(a) (1958) (emphasis added). Neither the phrase "for each working day," nor the phrase "in each of twenty or more calendar weeks" appears in the Unemployment Compensation Act. Their conspicuous absence casts serious doubts upon their assumed parentage. But Senator Dirksen had quoted the latter phrase from the

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[15] *E.g., Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634-635 (1st Cir. 1983); *see also Vera-Lozano v. International Broadcasting*, 50 F.3d 67, 70 (1st Cir. 1995).

[16] According to the EEOC, the Senate debate on H.R. 7152 spanned 83 days and lasted 534 hours, 1 minute and 37 seconds. *EEOC's Legislative History Of Title VII* at 11. This passing reference seems to be Senator Dirksen's most detailed exposition on the meaning of the phrase "for each working day."

Illinois Fair Employment Practices Act. 110 Cong. Rec. 6450 (1964).[17] The Senator's statement does not constitute such a "clearly expressed legislative intention" to adopt the payroll method to override the plain language of the statute. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). To the contrary, the Senator's isolated remark appears to be something less than accurate, and thus serves as a rather flimsy basis for this Court to undertake a function best left to Congress. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (Jackson, J., concurring) ("casual statements from floor debates [are] not always distinguished for . . . accuracy. . . . ") Senator Humphrey explained the basis for the amendment in terms suggestive of an employers output, stating that once the number of employees exceeds 25 "they get into some reasonable degree of gross product in terms of income or output or salaries or goods or services." 110 Cong. Rec. 13.088 (1964). An employee generates "income or output or . . . goods" only when he is present at work. Thus the phrase "for each working day" evinces an intention to limit the application of Title VII by counting employees only when they are at work.

Petitioners further attempt to divine Congressional intent from a Revenue Ruling that addressed the proper

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[17] The Illinois Fair Employment Practice Act provided:

> (d) "Employer" includes and means all persons, including any labor organization, labor unions, or labor association employing more than 100 persons within the State within each of 20 or more calendar weeks, within either the current or preceding calendar year prior to January 1, 1963.

110 Cong. Rec. 6450 (1964).

method for counting employees under the Unemployment Compensation Act. Rev. Rul. 55-19, 1955-1 C.B. 496-99, *reprinted at* J.A. 80-85. As respondents have demonstrated, petitioners' reliance upon Revenue Ruling 55-19 proceeds from a false premise. Moreover, reliance upon Ruling 55-19 would exalt an administrative interpretation and abrogate the Constitutionally appointed role of the judiciary. Where Congress adopts a *judicially* defined concept, a court is justified in presuming that Congress intended to adopt the judicial interpretation of that concept. *Davis v. Michigan Department of Treasury*, 498 U.S. 803, 813 (1989) Revenue Rulings are not judicial interpretations and they do not have the force of law. *Dixon v. United States*, 381 U.S. 68, 73 (1964). A revenue ruling represents nothing more than the Commissioner's position with respect to a particular factual situation. *E.g., Segel v. Commissioner*, 89 T.C. 816, 847 (1987). Accordingly, Courts have recognized that revenue ruling has no more binding or legal effect than would the opinion of any other lawyer. *Kaiser v. United States*, 262 F.2d 367, 370 (7th Cir. 1958); *Browne v. Commissioner*, 73 T.C. 723, 731 (1980) (Hall, J., concurring)

Because revenue rulings lack the force and effect of law, this Court need not, and indeed should not, adopt the fictitious assumption that Congress intended to adopt the Unemployment Act's interpretation of "employer." Neither Senator Dirksen's comments nor any of the other relevant legislative history show that Congress was aware of Revenue Ruling 55-19, much less that it considered the ruling. Senator Dirksen stated only that he "went through the matter with the Department of Labor and others." 110 Cong. Rec. 13087 (1964) From this remark,

Walters concludes the Senator was aware of Revenue Ruling 55-19. The Department of Labor is not empowered to issue Revenue Rulings. And the Senator did not identify the "others" with whom he conferred. There is simply no foundation for such speculation.

Finally, had Congress in fact considered the import of Revenue Ruling 55-19, it would have reached the inescapable conclusion that the ruling had no binding force or effect whatsoever with regard to the interpretation of the Unemployment Compensation Act. The Introduction to the Cumulative Bulletin for 1955, provided following statement explicit limiting the force and effect of the Commissioner's rulings:

> Revenue Rulings reported in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury Decisions), but as published precedents to be used in the disposition of other cases, and may be cited and relied upon for this purpose. *However, since each published ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved,* Revenue officers *and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same.* In applying rulings, consider the effect of subsequent legislation, regulations, court decisions and rulings.

1955-1 C.B. at 1 (emphasis added). Had Congress searched for a judicial authority that had followed, or even cited the Ruling in 1963, it would have found none. Finally, this Court had already declared that revenue

rulings lacked the force and effect of law. *Bartels v. Birmingham*, 332 U.S. 126, 132 (1947). Thus, Petitioners' suggestion that intended the term "employer" to receive the same interpretation accorded under the Unemployment Act proceeds from an utterly false premise and must be rejected.

Finally, Revenue Ruling 55-19 employed a counting method that is neither internally consistent nor consistent with the petitioners' payroll method. Petitioners cite the ruling as the "settled administrative interpretation" which explained that an employment relationship continues to exist "so long as the parties intend for the employee to continue to work . . . in the future *such that the relationship has not been definitely terminated.*" EEOC Brief at 30-31. The ruling addressed the question of how to count an employee who had accrued vacation time at the time he resigned. Rev. Rul. 55-19, 1955-1 C.B. 496, 497 (J.A. 82). According to the IRS, such an individual would be "considered as being in the employ of the employer *during the vacation period.*" *Id.* (emphasis added). The verb "resign" is commonly understood to mean that a person has definitely terminated his or her employment relationship. *See American Heritage Dictionary* 1051 (2d Ed. 1982) (def. 3: defining "resign" to mean "[t]o give up one's job or office; quit, esp. by formal notification.) Counting an employee during the existence of an ongoing employment relationship and doing so after the employee has resigned are irreconcilable. Moreover, whereas the IRS counted both employees for the first week "during the vacation period," petitioners would not count either of them because neither was an employee "for each working day" of that week. *See* Walters' Brief at 22-23. Finally the

approach the IRS followed in Revenue Ruling 55-19 is also inconsistent with the Department of Labor regulations implementing the FMLA which the petitioners cite as additional support for their version of the payroll method.[18]

In the absence of a clear legislative intent to the contrary, the Act of Congress must be applied as written. *E.g., Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The sparse legislative history of the Senate amendment adding the phrase "for each working day" does not provide a clear indication that Congress intended the definition of "employer" to be construed as petitioners suggest.

B. The Legislative History Of The Family And Medical Leave Act Is Not Indicative Of Congressional Intent With Regard To Title VII's Definition Of The Term "Employer."

Petitioners maintain that legislative history of the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.*, supports the adoption of the payroll method when counting employees under Title VII. Walters further contends that the continued application of the day-by-day approach adopted by the courts below will "unsettle" the interpretation of the Family and Medical Leave Act.

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[18] *See* Walters' Brief at 24-25; EEOC's Brief at 35-36 and n.24; *see also* 29 C.F.R. §§ 825.104(a), 825.105(b)-(e), *reprinted at* Pet. Supp. Br. App. 1a-2a.

The EEOC concedes that the 1993 Senate report accompanying the FMLA cannot serve as a reliable indicator of what Congress intended when it enacted Title VII thirty years earlier. *See* EEOC Brief at 33. This Court has spurned attempts to divine of an earlier congress from legislative action taken by a later congress. *E.g., Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989). Remarks in the subsequent legislative history have been accorded even less consideration. For example, in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), this Court found comments in a Committee Report accompanying the 1978 amendments to the ADEA unpersuasive and insufficient to overcome the plain language Congress had given the ADEA in 1967. *Id.* at 758. As the court of appeals correctly observed, the Senate report upon which petitioners rely is not legislation, but merely subsequent legislative history. 60 F.3d at 1228-29 (95-259 Pet. App. at 8a).

Nevertheless, the EEOC cites the Senate Report as an example of the reasonableness of its interpretation requiring application of the payroll method. Petitioners contend that this Court must construe Title VII's definition in the context of the overall body of antidiscrimination legislation. How courts will construe the definition of "employer" under the FMLA is not before this Court. *See* 60 F.3d at 1230 (95-259 Pet. App. at 11a). It appears that no court has addressed the method of counting employees for purposes of the FMLA. It is reasonable to assume that if and when that issue becomes ripe for

adjudication, the court will adhere to established principles of statutory construction and begin with the language of the statute, not with an excerpt from a Committee Report.

While this Court need not address or interpret the FMLA definition, a plain reading of that definition reveals that it does not dictate the payroll approach as petitioners contend. Petitioners note the apparent similarity between the Title VII definition and the FMLA definition, but overlook several important distinctions between the two. Congress did not adopt the FMLA definition from Title VII *in haec verba* as it did when it enacted the ADEA and the Americans With Disabilities Act. Instead, Congress drafted yet another definition of "employer." 29 U.S.C. § 2611(4)(A). Apart from the obvious numerical difference, Congress substituted the verb "employs" for Title VII's use of the verb "has." *See id.* Thus, the FMLA looks to the number of employees a person "employs . . . for each working day." *See id.* Congress further modified the Title VII definition of "employer" by defining the verb "employ" to include "to suffer or permit to work." 29 U.S.C. § 2611(3).[19] Thus, for purposes of the FMLA, an "employer" is a "person" who "suffer[s] or permit[s]" "50 or more employees" "to work" "for each working day during 20 or more calendar workweeks in the current or preceding calendar year." It is difficult to imagine how an "employer" can "suffer or permit" an "employee" "to work" if the employee is not

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[19] Section 101(c) of the FMLA incorporates the definition of the verb "employ" from Section 3(g) of the Fair Labor Standards Act. 29 U.S.C. § 203(g).

physically present at the workplace, wherever that may be. The day-by-day method of counting employees would also seem to be consistent with the plain language of the FMLA. Consequently, the conflict Walters portends is a false one because the payroll method "fits most logically and comfortably into" the FMLA.

III. This Court Owes No Deference To The EEOC's Interpretation Of Its Own Jurisdiction; That Determination Rests Solely With This Court.

Petitioners suggest that this Court should pay deference to the EEOC's interpretation of the statute because the EEOC is charged with the administration and enforcement of Title VII. The issue before this Court transcends the mere arithmetical counting of employees because Section 701(b) defines the EEOC's jurisdiction. This Court has long recognized that "[t]he determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." *Addison v. Holly Hill Co.*, 322 U.S. 607, 616 (1943). Similarly, in *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), the Court explained that "[a]n agency may not finally decide the limit of its statutory power. That is a judicial function." *Id.* at 369.

Petitioners attempt to avoid this result, arguing that since Congress authorized the EEOC to provide interpretations and opinions, it must have also intended that the EEOC should make determinations concerning Title VII's coverage. 42 U.S.C. § 2000e-12(b). This argument must fail because section 713(b) of Title VII says nothing concerning the EEOC's authority to determine employer

coverage. It merely provides a safe harbor for persons who rely upon the Commission's guidance concerning the legality of their employment practices or compliance with Title VII's reporting requirements.[20] That Congress authorized the Commission to issue advisory opinions concerning a person's contemplated action, affords no rationale basis to conclude that it also intended the Commission to determine a person's status as an "employer," particularly in light of the longstanding doctrine of *Addison v. Holly Hill Co.*, 322 U.S. 607, 616 (1943). This Court has rejected such bootstrapping. In *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), this Court rejected the Commission's interpretation of the scope of its own jurisdiction:

> But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. [Citation omitted.] This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that *an agency may not bootstrap itself into an area in which it has no jurisdiction*. . . .

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[20] Section 713(b) affords a defense against "any liability or punishment for on or account of (1) the commission by such person of an unlawful employment practice . . . or (2) the failure of such person to publish and file any information required by any provision of [Title VII]." 42 U.S.C. §§ 2000e-12(b)(1); 2000e-12(b)(2).

Id. at 745 (emphasis added). Paying deference to the EEOC's interpretation would permit the EEOC to bootstrap itself into an area into which Congress never intended the EEOC to tread.

To pay deference to the EEOC's interpretation of the definition of "employer" would be to abdicate this Court's constitutional duty to independently survey the bounds of the EEOC's jurisdiction. Finally, the EEOC's interpretation of Section 701(b) would be especially unwarranted because section 701(b), in conjunction with section 706(f)(3) determines the scope of the district court's jurisdiction as well.

IV. This Court Should Give Little Credence To The Commission's Policy Guidance.

The EEOC concedes, as it must, that Congress did not confer upon it the authority to promulgate rules or regulations. *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976).[21] Nevertheless, petitioners contend that this Court owes particular deference to the EEOC's Policy Statement No. N-915-052 (April 20, 1990) (95-259 Pet. App. 30a-40a).[22] The EEOC's guidelines lack the force of law

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[21] Section 713(a) of Title VII granted the EEOC limited rulemaking authority that extends only to procedural regulations. *See* 42 U.S.C. 2000e-12(a). The EEOC's regulations implicitly recognize that it lacks the authority to expound on the meaning of terms Congress has already defined. *See* 29 C.F.R. § 1601.2 and § 1601.3 (definitions of various terms including "employer" shall have the meanings set forth in Title VII).

[22] 3 EEOC Compliance Manual (BNA), *Policy Guidance: Whether part-time employees are employees within the meaning of*

and should therefore be accorded less weight than administrative regulations. *Id.*

In *Gilbert*, the Court applied the standard announced in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) to determine how much weight to accord to the EEOC's guideline. In *Skidmore*, the Court explained:

> The weight of such a judgment in a particular case will depend upon the thoroughness of its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 142.

As in *Gilbert*, the EEOC's guideline "does not fare well under these standards." *Id.* The validity of its reasoning is suspect. Petitioners' interpretation demands a strained reading to give meaning to the phrase "for each working day." That reading seems "highly unlikely" (95-259 Pet. App. 6a) and finds no clear support in the legislative history.

Courts have rejected requests for "heightened deference" to an agency's interpretation when the agency's position has been inconsistent. *E.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 4466 n.30 (1987), *quoting Watt v.*

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§ 701(b) of Title VII and § 11(b) of the ADEA, N:3311-N:3316 (95-259 Pet. App. 30a-40a). The "Subject" and "Purpose" of the policy statement reflect confusion between the threshold issue of *whether* a person is an "employee" within the meaning of Section 701(f) who *should* be counted, and the issue before this Court, *viz.*, if so, *how* should the person be counted. *Id.* at N:3313 (95-259 Pet.App.30a).

Alaska, 451 U.S. 259, 273 (1981). Petitioners positions concerning the proper application of the payroll method have been anything but consistent.

Petitioners claim that the interpretation set forth in the EEOC's Policy Guidance dates back to 1966.[23] On closer examination, it appears that the EEOC's current view of the payroll method has not been as long-standing and consistent as petitioners suggest. The EEOC's current Policy Guidance petitioners rely upon was issued on April 20, 1990 – after several courts had rejected the payroll method.[24] The 1990 Policy Guidance was "intended as an amendment and clarification of" the EEOC's earlier interpretation. 95-259 Pet. App. 31a n.1.

Unlike the 1990 Policy Guidance, the EEOC's prior interpretation did not focus on the existence of an employment relationship, but upon the number of days an employee worked. The former interpretation directed investigators to:

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[23] Petitioners cite a May 11, 1996 opinion of the EEOC's general counsel and refer to two other opinion letters that were cited in *Pascutoi v. Washburn-McReavy Mortuary*, 11 Fair Empl. Prac. Cas. (BNA) 1325 (D. Minn. 1975). Neither the EEOC nor Walters cited the General Counsel Opinions in either the district court or in the court of appeals.

[24] *See Zimmerman v. North American Signal Co.*, 704 F.2d 347, 354 (7th Cir. 1983); *McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983); *EEOC v. Argent Industries, Inc.*, 746 F. Supp. 705, 708-09 (S.D. Ohio 1989); *Schoenbaum v. Orange County Center for the Performing Arts*, 677 F.Supp. 1036, 1038-39 (C.D. Cal. 1987).

> count the number of people employed during the year of the alleged violation and the preceding year. If respondent *employed* 15 or more employees *for each working day for* 20 or more calendar weeks in either year, respondent is an employer.

1 EEOC Compliance Manual § 605.8(b) *Does Respondent Employ 15 or More Employees* (BNA) 605:021. The common meaning of the verb "employ" is "[t]o engage the services of; put to work." American Heritage Dictionary 450 (2d ed. 1982). Thus, until 1990 the EEOC's interpretation looked to whether a person had "engaged the services of" or "put to work" 15 or more employees "for each working day for 20 or more calendar weeks." Being "put to work" suggests more than merely being in an employment relationship. In common understanding, being "put to work" contemplates nothing short of actually working for an employer.

The Commission's pre-1990 interpretation included an illustration that also focused upon whether the employees actually "*worked* each working day." 1 EEOC Compliance Manual § 605.8(b) 605:021. *Id.* (emphasis added). The example involved a respondent who had "13 regular full-time employees who *worked all year* . . . with the exception of two weeks [*sic*] vacation each." *Id.* (emphasis added). Respondent also employed 10 part-time and temporary employees, six of whom "*worked each working day* during each of 26 weeks" during the year in question. *Id.*[25] (emphasis added). By "[a]dding these six

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[25] The information for this illustration was obtained by requesting, among other information, "[a] list of respondent's

employees to the 13 regular full-time employees," the EEOC determined that the respondent "*employs* 19 individuals and is an employer within the meaning of § 701(b)." *Id.* (emphasis added). Section 605.8(b) of the earlier version of the EEOC's interpretation made no reference to the existence of an "employment relationship." Nor did it suggest that persons who either began or ended their employment relationship during the week should be excluded from the jurisdictional count for the entire week.

Petitioners have also altered their position with respect to the proper application of method during the course of this litigation. Respondents have previously explained this inconsistency in detail and will refrain from needless repetition. In short, petitioners simply counted the number of names that appeared on Metropolitan's payroll for a given week. This application of the payroll method rendered the phrase "for each working day" meaningless. Petitioners appear to have adopted a slightly different application of the payroll method in this

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part-time and temporary employees" indicating "*how many days or partial days per week each employee worked, which weeks each employee worked, and the total number of weeks each worked.*" 1 EEOC Compliance Manual § 605.8(b) *Does Respondent Employ 15 or More Employees?* 605:0022 (emphasis added). Under the EEOC's current interpretation as set forth in its 1990 Policy Guidance, information concerning the EEOC's current position is that "all part-time employees are counted whether they work part of each day or part of each week, as long as they are on the payroll." 95-259 Pet. App. at 34a. Thus, the number of days or partial days a person worked would be of no relevance in determining the number of employees under the EEOC's current Policy Guidance.

Court. An agency interpretation which conflicts with an earlier interpretation is entitled to "considerably less deference" than a view the agency has held consistently. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987), *quoting Watt v. Alaska*, 451 U.S. 259, 273 (1981); *see also General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976). A request that this Court defer "to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 213 (1988).

CONCLUSION

Respondents, Metropolitan Educational Enterprises, Inc. and Leonard Bieber, respectfully request that the judgment of the court of appeals be affirmed.

Respectfully submitted,

PATRICK J. FALAHEE, JR.
Counsel of Record
53 West Jackson Boulevard
Suite 541
Chicago, Illinois 60604-3607
(312) 322-1103

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